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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

8 Plaintiff(s),

9 v.

10 RAYMOND JUAREZ, et al.,

11 Defendant(s).

Case No. 2:11-CR-91 JCM (CWH)

ORDER

12  
13 Presently before the court is petitioner Raymond Juarez's abridged motion to vacate, set  
14 aside, or correct sentence pursuant to 28 U.S.C. § 2255. (ECF No. 82).

15 Also before the court is petitioner's motion to vacate, set aside, or correct sentence pursuant  
16 to 28 U.S.C. § 2255. (ECF No. 92). The government filed a response (ECF No. 96), to which  
17 petitioner replied (ECF No. 104).

18 **I. Facts**

19 On March 8, 2011, the government filed an indictment charging the petitioner with six  
20 counts of interference with commerce by robbery ("Hobbs Act robbery"), one count of conspiracy  
21 to commit Hobbs Act robbery, and seven counts of use and carry of a firearm in relation to a crime  
22 of violence. (ECF No. 1). On March 7, 2012, petitioner pleaded guilty to one count of conspiracy  
23 to commit Hobbs Act robbery (count 1), four counts of Hobbs Act robbery (counts 3, 5, 7, and 9),  
24 and one count of discharging a firearm during a crime of violence (count 8). (ECF Nos. 49, 50).  
25 Importantly, petitioner pleaded guilty to count eight (discharging a firearm during a crime of  
26 violence), which, according to the indictment, was tethered to count seven (one of the Hobbs Act  
27 robbery counts). *See* (ECF Nos. 1, 49, 50).  
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1 On June 14, 2012, the court<sup>1</sup> sentenced petitioner to 110 months imprisonment on counts  
2 1, 3, 5, 7, and 9 (“to run concurrently”), and 120 months imprisonment on count 8 (“to run  
3 consecutively”). (ECF Nos. 66, 67). This resulted in a cumulative sentence of 230 months. The  
4 court entered the judgment on the same day. (ECF No. 67). Petitioner did not appeal the judgment.

## 5 **II. Legal Standard**

6 Federal prisoners “may move . . . to vacate, set aside or correct [their] sentence” if the court  
7 imposed the sentence “in violation of the Constitution or laws of the United States . . .” 28 U.S.C.  
8 § 2255(a). Relief pursuant to § 2255 should be granted only where “a fundamental defect” caused  
9 “a complete miscarriage of justice.” *Davis v. United States*, 417 U.S. 333, 345 (1974); *see also*  
10 *Hill v. United States*, 368 U.S. 424, 428 (1962).

11 Limitations on § 2255 motions are based on the fact that the movant “already has had a fair  
12 opportunity to present his federal claims to a federal forum,” whether or not he took advantage of  
13 the opportunity. *United States v. Frady*, 456 U.S. 152, 164 (1982). Section 2255 “is not designed  
14 to provide criminal defendants multiple opportunities to challenge their sentence.” *United States*  
15 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

## 16 **III. Discussion**

17 In his instant motion, petitioner moves to vacate pursuant to *Johnson v. United States*, 135  
18 S. Ct. 2551 (2015) (“*Johnson*”), and requests that the court resentence petitioner. (ECF No. 92).  
19 In particular, petitioner argues that his conviction violates the Constitution’s guarantee of due  
20 process.

21 In *Johnson*, the United States Supreme Court held the residual clause in the definition of a  
22 “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B) (“ACCA”),  
23 to be unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defines “violent felony” as any  
24 crime punishable by imprisonment for a term exceeding one year, that:

25 (i) has as an element the use, attempted use, or threatened use of physical force  
26 against the person of another; or

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27  
28 <sup>1</sup> The Honorable Judge Roger L. Hunt presided over this action prior to his recusal on July  
11, 2016. *See* (ECF No. 88).

1 (ii) is burglary, arson, or extortion, involves use of explosives, ***or otherwise***  
2 ***involves conduct that presents a serious potential risk of physical injury to***  
3 ***another.***

4 18 U.S.C. § 924(e)(2)(B) (emphasis added). The emphasized above is known as the ACCA’s  
5 “residual clause.” *Johnson*, 135 S. Ct. at 2555–56. The Court held that “increasing a defendant’s  
6 sentence under the clause denies due process of law.” *Id.* at 2557.

7 Petitioner asserts that his conviction is not subject to the provisions of § 924(c)(3) because  
8 his underlying conviction (Hobbs Act robbery) does not constitute a “crime of violence.” (ECF  
9 No. 92 at 10). Petitioner argues that his sentence is unconstitutional under *Johnson* because  
10 *Johnson*’s holding applies equally to the residual clause in § 924(c). *Id.* at 6. Petitioner asserts  
11 that armed bank robbery cannot constitute a crime of violence without relying on the residual  
12 clause. *Id.* at 12. The court disagrees.

13 Subsection (3) of § 924(c) defines the term “crime of violence” as an offense that is a felony  
14 and—

15 (A) has as an element the use, attempted use, or threatened use of  
16 physical force against the person or property of another, or

17 (B) that by its nature, involves a substantial risk that physical force  
18 against the person or property of another may be used in the course  
19 of committing the offense.

20 18 U.S.C. § 924(c)(3).

21 Petitioner argues that Hobbs Act robbery cannot categorically fall under the force clause  
22 of § 924(c)(3)(A) because “Hobbs Act robbery . . . may be committed without violent force, and  
23 thus is categorically not a crime of violence under the force clause.” (ECF No. 92 at 16).

24 Prior to the Supreme Court’s holding in *Johnson*, the Ninth Circuit held that Hobbs Act  
25 “[r]obbery indisputably qualifies as a crime of violence” under § 924(c).<sup>2</sup> *United States v. Mendez*,

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26 <sup>2</sup> In addition, Ninth Circuit caselaw discussing § 2113(a), an analogous bank robbery  
27 statute, held that armed bank robbery under the statute constituted a crime of violence. *See United*  
28 *States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000) (citing 18 U.S.C. § 2113(a)) (“Armed bank  
robbery qualifies as a crime of violence because one of the elements of the offense is a taking ‘by  
force and violence, or by intimidation.’”); *see also United States v. Selfa*, 918 F.2d 749, 751 (9th  
Cir. 1990) (“We therefore hold that persons convicted of robbing a bank ‘by force and violence’

1 992 F.2d 1488, 1491 (9th Cir. 1993). Petitioner asks the court to revisit this question in light of  
2 *Johnson*.

3 In 2016, the Ninth Circuit was confronted with the same argument that petitioner raises  
4 here, that “because Hobbs Act robbery may also be accomplished by putting someone in ‘fear of  
5 injury,’ 18 U.S.C. § 1951(b), it does not necessarily involve ‘the use, attempted use, or threatened  
6 use of physical force,’ 18 U.S.C. § 924(c)(3)(A).” *United States v. Howard*, 650 Fed App’x. 466,  
7 468 (9th Cir. 2016). The court held that Hobbs Act robbery nonetheless qualified as a crime of  
8 violence under the force clause:

9 [Petitioner’s] arguments are unpersuasive and are foreclosed by  
10 *United States v. Selfa*, 918 F.2d 749 (9th Cir.1990). In *Selfa*, we  
11 held that the analogous federal bank robbery statute, which may be  
12 violated by “force and violence, or by intimidation,” 18 U.S.C. §  
13 2113(a) (emphasis added), qualifies as a crime of violence under  
14 U.S.S.G. § 4B1.2, which uses the nearly identical definition of  
15 “crime of violence” as § 924(c). *Selfa*, 918 F.2d at 751. We  
16 explained that “intimidation” means willfully “to take, or attempt to  
17 take, in such a way that would put an ordinary, reasonable person in  
18 fear of bodily harm,” which satisfies the requirement of a  
19 “threatened use of physical force” under § 4B1.2. *Id.* (emphasis  
20 added) (quoting *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th  
21 Cir.1983)). Because bank robbery by “intimidation”—which is  
22 defined as instilling fear of injury—qualifies as a crime of violence,  
23 Hobbs Act robbery by means of “fear of injury” also qualifies as  
24 crime of violence.

25 650 Fed. App’x. at 468.

26 Since *Howard*, two courts in this district have found that “Hobbs Act robbery is  
27 categorically a crime of violence under the force clause.”<sup>3</sup> *United States v. Mendoza*, no. 2:16-cr-  
28 00324-LRH-GWF, 2017 WL 2200912, at \*2 (D. Nev. May 19, 2017); *see United States v.*  
*Barrows*, no. 2:13-cr-00185-MMD-VCF, 2016 WL 4010023 (D. Nev. July 25, 2016).

or ‘intimidation’ under 18 U.S.C. § 2113(a) have been convicted of a ‘crime of violence’ within  
the meaning of Guideline Section 4B1.1.”).

<sup>3</sup> In addition, at least four courts in this district have held that § 2113 robbery is a crime of  
violence under the force clause. *See United States v. Wesley*, 241 F. Supp. 3d 1140, 1145 (D. Nev.  
2017) (Hicks, J.); *United States v. Ali*, no. 2:06-cr-00160-APG-RJJ, 2017 WL 3319115, at \*2, \*2  
n.9 (D. Nev. Aug. 3, 2017) (collecting cases from the District of Nevada and other districts); *United*  
*States v. Tellez*, no. 2:02-cr-00279-JAD-VCF, 2017 WL 2192975, at \*2-3 (D. Nev. May 18, 2017);  
*United States v. Loper*, 2:14-cr-00321-GMN-NJK, 2016 WL 4528959, at \*2 (D. Nev. Aug. 29,  
2016).

1 The court holds that Hobbs Act robbery constitutes a crime of violence under § 924(c)(3)'s  
2 force clause. Under the elements set forth in the language of § 1951, petitioner's underlying felony  
3 offense (armed bank robbery) is a "crime of violence" because the offense has, "as an element the  
4 use, attempted use, or threatened use of physical force against the person or property of another."  
5 18 U.S.C. § 924(c)(3)(A); *see Mendoza*, 2017 WL 2200912, at \*2. Therefore, *Johnson* is  
6 inapplicable here because petitioner's sentence does not rest on the residual clause of § 924(c).  
7 Petitioner's argument, relying primarily on *United States v. Torres-Miguel*, 701 F.3d 165, 167–  
8 169 (4th Cir. 2012), is unpersuasive. (ECF No. 92 at 16-19).

9 In light of the foregoing, petitioner has failed to show that his sentence is unconstitutional  
10 under *Johnson* or otherwise. Accordingly, the court will deny petitioner's motion to vacate, set  
11 aside, or correct sentence pursuant to 28 U.S.C. § 2255.

#### 12 **IV. Certificate of appealability**

13 The court declines to issue a certificate of appealability. The controlling statute in  
14 determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as  
15 follows:

16 (a) In a habeas corpus proceeding or a proceeding under section  
17 2255 before a district judge, the final order shall be subject to  
18 review, on appeal, by the court of appeals for the circuit in which  
the proceeding is held.

19 (b) There shall be no right of appeal from a final order in a  
20 proceeding to test the validity of a warrant to remove to another  
21 district or place for commitment or trial a person charged with a  
22 criminal offense against the United States, or to test the validity of  
such person's detention pending removal proceedings.

23 (c)

24 (1) Unless a circuit justice or judge issues a certificate of  
25 appealability, an appeal may not be taken to the court of appeals  
26 from—

27 (A) the final order in a habeas corpus proceeding in which  
the detention complained of arises out of process issued by  
a State court; or

28 (B) the final order in a proceeding under section 2255.

1 (2) A certificate of appealability may issue under paragraph (1) only  
2 if the applicant has made a substantial showing of the denial of a  
constitutional right.

3 (3) The certificate of appealability under paragraph (1) shall indicate  
4 which specific issue or issues satisfy the showing required by  
paragraph (2).

5 28 U.S.C. § 2253.

6 Under § 2253, the court may issue a certificate of appealability only when a movant makes  
7 a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a  
8 substantial showing, the movant must establish that “reasonable jurists could debate whether (or,  
9 for that matter, agree that) the petition should have been resolved in a different manner or that the  
10 issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v.*  
11 *McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted).

12 The court finds that petitioner has not made the required substantial showing of the denial  
13 of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists  
14 would not find the court’s determination that movant is not entitled to relief under § 2255  
15 debatable, wrong, or deserving of encouragement to proceed further. *See id.* Accordingly, the  
16 court declines to issue a certificate of appealability.

17 **V. Conclusion**

18 Accordingly,

19 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that petitioner’s abridged  
20 motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 82) be, and  
21 the same hereby is, DENIED.

22 IT IS FURTHER ORDERED that petitioner’s motion to vacate, set aside, or correct  
23 sentence pursuant to 28 U.S.C. § 2255 (ECF No. 92) be, and the same hereby is, DENIED.

24 DATED May 23, 2018.

25   
26 UNITED STATES DISTRICT JUDGE